Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

A. DOE, a single person,

Petitioner,

v.

MILES INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Arizona Court Of Appeals, Division Two

PETITION FOR WRIT OF CERTIORARI

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68 pp

I. QUESTIONS PRESENTED

A. Petitioner correctly argued that respondents had the burden of proof on their affirmative statute of limitations defense. None of them disputed this in either their initial Motion papers, nor in their Replies, nor did the trial court suggest otherwise. Nevertheless, the Arizona Court of Appeals placed the burden of proof on petitioner and found his failure to meet that ostensible burden as dispositive against him; it then denied his motions for reconsideration and to supplement the record.

Question: Whether it denies procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution to expunge a catastrophically injured consumer's causes of action by placing the burden of proof on him for the first time on appeal (after his opportunity to develop a record before the trial court has passed) and to then deny him an opportunity to present the very proof said to be lacking to meet his ostensible burden of proof.

B. Petitioner asked the Arizona Supreme Court to exercise its discretion to review the Arizona Court of Appeals' decision, and put before it the evidence that he had asked the intermediate court to add to the record. Respondents moved to strike this evidence, but the Arizona Supreme Court both refused to strike and granted the Petition for Review. Petitioner therefore refused a $100,000 ostensible national settlement class offer. Then, however, the Arizona Supreme Court vacated its decision to review without explanation.

I. QUESTIONS PRESENTED – Continued

Question: Whether it denies procedural due process guaranteed by the Fourteenth Amendment to the United States Constitution to lead a catastrophically injured consumer to reasonably believe that dispositive evidence he has presented will be considered, to allow him to reasonably rely on that expectation and forfeit a $100,000 settlement, and then to, without explanation, *not* consider the evidence.

LIST OF PARTIES

A. DOE, a single person Petitioner.

MILES INC.; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; RHONE-POULENC, INC.; ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE; STATE OF ARIZONA; DR. JAMES CORRIGAN and CAROLYN CORRIGAN; ST. JOSEPH'S HOSPITAL & MEDICAL CENTER; CATHOLIC HEALTHCARE WEST, Respondents.

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The Special (ABA) Committee on the Tort Liability System, *Towards A Jurisprudence Of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, pages 4-1 to 4-225 (1984) 10

II. JURISDICTION.

This Court has jurisdiction to review decisions of the Arizona Court of Appeals expunging petitioner's causes of action (entered on February 18, 1997 – App. 1) and refusing to allow him to supplement the record (entered on March 21, 1997 – App. 15) (and related actions of the Arizona Supreme Court first granting discretionary review and accepting new evidence (App. 16), then summarily vacating the grant of the Petition for Review (App. 18), and, finally, denying petitioner's Motion for Reconsideration on June 6, 1998 (App. 20)) under 28 U.S.C. § 1257 (as revised 1988) because petitioner demonstrates that these actions violate the Fourteenth Amendment to the United States Constitution. The February 18, 1997, and March 21, 1997, actions of the Arizona Court of Appeals are technically the orders appealed from because review thereafter was nominally discretionary, and the appropriate remedy is to direct that court to accept and either consider petitioner's evidence itself or remand to the trial court for the same purpose. Therefore, petitioner is seeking the issuance of a writ of certiorari to the Arizona Court of Appeals. Nevertheless, the subsequent proceedings in the Arizona Supreme Court both (1) extended the time to petition this Court to ninety days following the Arizona Supreme Court's final summary action on June 16, 1998, and (2) exacerbated the denial of procedural due process initiated by the Arizona Court of Appeals.

III. CONSTITUTIONAL PROVISION INVOLVED.

The Fourteenth Amendment to the United States Constitution, Section 1 states:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV. STATEMENT OF THE CASE

Plaintiff/petitioner, A. Doe, filed his complaint, containing numerous, independent causes of action against defendants/respondents, as well as defendant University Medical Center ("UMC"), on July 16, 1993. (UMC was granted summary judgment on grounds not at issue here, and no appeal was taken therefrom.) Defendants/respondents Arizona Board of Regents, University of Arizona, University of Arizona College of Medicine, State of Arizona, Dr. James Corrigan and Mrs. Jane Doe Corrigan (hereinafter "the state respondents") filed a Motion for Summary Judgment against A. Doe on August 29, 1995. Defendants/respondents St. Joseph's Hospital and Medical Center and Catholic Healthcare West joined in the state respondents' Motion for Summary Judgment against A. Doe on September 8, 1995. Defendants/respondents

Baxter Healthcare Corp., Miles Inc., Armour Pharmaceutical Co., Rhone-Poulenc, Inc. and Alpha Therapeutic Corp. (hereinafter "the fractionator respondents") filed a Motion for Summary Judgment against A. Doe on September 1, 1995.

All these motions were based on respondents' affirmative defense of statute of limitations. They argued that, under Arizona's discovery rule, the statute of limitations had run against A. Doe because there was no triable issue of fact disputing that he knew, or reasonably should have known, two years prior to the filing of his complaint that he was injured, who caused his injuries, and what caused his injuries.

Summary judgment was granted against A. Doe and in favor of all respondents by a Minute Entry dated December 5, 1995. This Minute Entry gave no reasons for the trial court's action. A. Doe took a timely appeal to the Arizona Court of Appeals. (A. Doe's mother's case – Jane Doe v. Miles Inc., et al. – alleging the death of his twin brother was also dismissed on summary judgment, and her appeal was consolidated with A. Doe's at respondents' request. A. Doe's mother's case suffered the same fate as his. Having earlier settled with the fractionator respondents, his mother is not pursuing her case before this Court.)

A. Doe filed an "Omnibus Response" to respondents' Motions for Summary Judgment at the trial court level, arguing that respondents had not met their burden of proving that there was no triable issue of fact and that they were therefore entitled to judgment as a matter of law. Respondents each replied by reaffirming their argument that facts on the record demonstrated that there was no triable issue of fact. None of them ever alleged, either

in their initial Motion papers or in their Replies, that A. Doe had the burden of proof. Had respondents done so, A. Doe would have answered with citation of authority and affidavits that would have anticipated a possible ruling against him on the burden of proof issue.

The Case Management Order at the trial court level afforded all the respondents a "joint defense privilege" despite A. Doe's objection thereto. The fractionator respondents "carried the ball" for most of the litigation, as they did at the oral argument on appeal before the Arizona Court of Appeals. Even in their Answering Brief, the fractionator respondents did not attempt to assert that A. Doe had the burden of proof. Rather, they conceded his statement of the proper standard of review in his Opening Brief as being "essentially *de novo*." Specifically, the fractionators stated in their Answering Brief: "On appeal from summary judgment, this Court determines *de novo* whether any genuine issue of material fact exists and whether the trial court erred in its application of the law."

The first and only attempt by any respondent to hint that A. Doe might have the burden of proof was in the state respondents' Answering Brief before the Arizona Court of Appeals, wherein they cryptically stated: "Appellant correctly states that this Court should view the evidence in the light most favorable to the party opposing summary judgment. Appellant, however, improperly places the burden of proof on the State Defendants. By law, it is Appellant's burden to show the statute of limitations has been tolled *Bailey v. Superior Court*, 143 Ariz. 494, 498, 694 P.2d 324, 328 (1985)."

As will be established below, *Bailey* actually supports placement of the burden of proof on respondents. In any event, at this point, the record was already set. The Arizona Court of Appeals, however, ignored prior Arizona law and placed the burden of proof on A. DOE. (App. 1.) This was dispositive because the Court of Appeals reasoned:

> [T]here is no evidence that plaintiffs did, or attempted to do, anything from 1987 to 1992 to investigate, explore or prosecute their claims. Nor did plaintiffs establish that, had they inquired and investigated their claims between 1987 and July 1991 (that is, more than two years before they filed suit), they would not have discovered the "facts" upon which their liability claims are based. When plaintiffs began investigating and obtaining more information in late 1992 and 1993, they acknowledged that "[i]t then became apparent to both of [them] that the blood companies might have been negligent," and therefore they contacted counsel in June 1993.
>
> App. 9.

A. Doe then made a Motion for Reconsideration and Motion for Order Allowing Supplementation of the Record. He proffered affidavits of victims and attorneys from all over the country stating that it was highly likely that A. Doe would have been told that he did *not* have a case if he had contacted an attorney or attorneys between 1987 and July 1991. (App. 22.) He stated that he would have provided this evidence at the trial court level if any

party or the court below had suggested he had the burden of proof. He specifically raised the due process issue placed before this Court, stating (App. 28):

"Plaintiffs respectfully note that the Court's reasoning is extremely harsh to the extent of denying fundamental due process of law."

The Arizona Court of Appeals summarily denied petitioner's Motions for Reconsideration and for an Order Allowing Supplementation of the Record. (App. 15.)

The Arizona Court of Appeals stated that its decision would not be published, but the fractionator respondents moved the court to publish its opinion in their Motion to Redesignate Memorandum Decision as Published Opinion filed March 5, 1997. Therein they argued (page 4, lines 6-10, and 16-19):

> "The issue of when a claim arising out of alleged infection with HIV from the use of factor concentrates accrues is both 'of unique interest and substantial public importance.' Unfortunately, it is also an issue that is arising in trial courts in Arizona and throughout the United States with increasing frequency. And many of the trial court rulings on the statute of limitations defense in hemophiliac/HIV cases will soon be ripe for appellate court review. [cites] Yet there are no reported Arizona decisions discussing this precise question and, as is apparent from the memorandum Decision handed down on February 18, 1997, there are only a handful of reported cases on point from other jurisdictions. This dearth of precedent militates strongly in

> favor of publishing this Court's disposition of these consolidated appeals."

The Arizona Court of Appeals granted respondents' motion.

A. Doe then timely filed a Petition for Review with the Arizona Supreme Court, and he attached his Motions for Reconsideration and for an Order Allowing Supplementation of the Record as an exhibit thereto. A. Doe once again specifically raised the due process argument at issue here, stating in his Petition for Review (page 16):

> "It is a denial of fundamental due process of law principles to allow 'trial by ambush' when it is clear, from the affidavits proffered by plaintiff after he had notice that the court considered the burden of proof issue dispositive, that plaintiff could prevail in a fair fight on the statute of limitations."

The State respondents moved to strike the new evidence (App. 37), but the Arizona Supreme Court both denied the Motion to Strike and granted A. Doe's Petition for Review. (App. 16.) The Arizona Supreme Court also granted separate Motions for Permission to File Amicus Curiae Briefs in support of A. Doe's position filed by the Committee of Ten Thousand (a national advocacy group for persons with hemophilia, HIV, or AIDS) and the Arizona Hemophilia Association.

At this time, A. Doe was again offered the choice to accept a $100,000 settlement with the fractionators (net of attorneys' fees and certain liens) as part of an ostensible nationwide settlement class action. This is the same settlement that the fractionators notified the Arizona

Supreme Court that A. Doe's mother had entered into. (App. 40.)

A. Doe continued to reject this offer, however, because the Arizona Supreme Court had: (1) granted his Petition for Review; *and* (2) allowed him to place before that Court the very evidence that the Arizona Court of Appeals both had said was lacking to meet A. Doe's so-called burden of proof and had previously disallowed to be added to the record.

After the case was orally argued, however, the Arizona Supreme Court vacated, without explanation, its order granting A. Doe's Petition for Review. (App. 18.)

A. Doe timely filed a Motion for Reconsideration, but the Arizona Supreme Court denied this Motion on June 16, 1998. (App. 20.) This Petition for Writ of Certiorari is being filed within ninety days from the latter date.

V. REASONS FOR GRANTING THE PETITION: THE COURT SHOULD GRANT THE PETITION BECAUSE THE ARIZONA COURT OF LAST RESORT REJECTED PETITIONER'S DUE PROCESS ARGUMENTS, DECIDING IN CONFLICT WITH PROCEDURAL DUE PROCESS DECISIONS OF THIS COURT, IN CERTAIN RESPECTS, AND, IN OTHER RESPECTS, RULING CONTRARY TO CONSTITUTIONAL CONCEPTS OF FUNDAMENTAL FAIRNESS AND NATIONAL IMPORTANCE THAT SHOULD BE CLARIFIED BY THIS COURT.

Petitioner, A. Doe, is one of many thousands of consumers catastrophically injured by AIDS-tainted commercial factor concentrates distributed in interstate and international commerce. Judge Posner, Chief Judge of the

United States Court of Appeals for the Seventh Circuit, explained – in *In Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), cert. denied sub. nom, *Grady v. Rhone-Poulenc Rorer, Inc.*, 576 U.S. 867 (1995) – that (1) as many as 10,000 United States residents have contracted AIDS and have died or will die from respondents' commercial factor concentrates, and (2) statute of limitations is a key issue in these cases. In *Rhone*, the court struck down a partial *litigation* class action.

Subsequently, in an amicus curiae brief filed in *Amchem Products, Inc. v. Windsor*, 177 S. Ct. 223 (1997), the fractionator respondents argued to this Court that affirmation of the Court of Appeals' decision therein would make illegal a subsequent *settlement* class action for the same class at issue in *Rhone*. (See 1996 WL 722038, page 3.) Although this Court affirmed in *Amchem* and despite their *Amchem* amicus brief, the fractionators persisted with their ostensible settlement class action. The validity of that action is presently being litigated in the United States Court of Appeals for the Seventh Circuit, and it will likely subsequently be presented to this Court. Even if the class settlement is upheld, there are already hundreds of opt-out cases that might be affected by the instant case. If the settlement class action is struck down, the instant case could affect thousands rather than "just" hundreds of cases.

Indeed, as pointed out in the Statement of the Case above, it is the fractionator respondents who first espoused the national importance of the instant case in their Motion to Redesignate Memorandum Decision as a Published Opinion, filed March 5, 1997. They have

emphasized the many similar cases, both statewide and nationwide, that might be affected by this case.

This case is of national importance for reasons in addition to those articulated by the fractionator respondents. The allocative and deterrent functions of the tort law are at issue in a magnified way in mass tort litigation because the thousands of cases involved each provide an opportunity for advance or sacrifice of those goals. See, generally, The Special (ABA) Committee on the Tort Liability System, *Towards A Jurisprudence Of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, especially pages 4-1 to 4-225 (1984). Fairness of and respect for the law are also at an issue in a magnified way when thousands of victims eagerly wait for and share their experiences with the legal system.

To be sure, each state is given the prerogative to recognize or not to recognize causes of action and to craft its own statutes of limitations for various causes of action. It is ultimately for this Court, however, to protect each consumer's right to the basic, minimum protections of due process of law once a state recognizes a property interest such as a cause of action. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). There this Court held that although property rights are established by state law, the procedures constitutionally required to protect those property rights are to be determined by this Court. Here, Arizona created causes of action and certain statutes of limitations applicable thereto. It applied these rules, however, in an arbitrary manner that was nothing short of summary adjudication. This is the antithesis of due process of law.

The facts that petitioner reasonably construed Arizona law to place the burden of proof on respondents, that they and the trial court acquiesced in this position, that the Arizona Court of Appeals nevertheless improperly placed the burden of proof on petitioner and considered it dispositive against him, that the Arizona Court of Appeals refused to allow petitioner to supplement the record with the very evidence it said was lacking, that the Arizona Supreme Court subsequently granted discretionary review and refused to strike the new, dispositive evidence, that petitioner reasonably relied on these actions and refused a $100,000.00 settlement, and that the Arizona Supreme Court then, without explanation, vacated its grant of the Petition for Review have all been explained in the Statement of the Case above. What remains are to elaborate on: (1) why petitioner reasonably stated that the burden of proof was on respondents; and (2) why he earlier would have supplied, and subsequently promptly did supply, dispositive evidence of the precise nature said to be lacking by the Arizona Court of Appeals.

Rule 8(b) of the Arizona Rules of Civil Procedure explicitly provides that the statute of limitations is an affirmative defense, and numerous cases have noted that the defendants have the burden of proof on affirmative defenses. *Pfeil v. Smith*, 183 Ariz. 63, 65, 900 P.2d 12, 14 (Ct. App. 1995); *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66 (1966); *Block, Robertshaw, Frederick, Copple & Wright, P.C. v. United States*, 130 Ariz. 110, 114, 634 P.2d 398 (Ct. App. 1989). As already explained, the respondents belatedly relied on *Bailey v. Superior Court*, 143 Ariz. 494, 498, 694 P.2d 324, 328 (1988). That case in

fact supports petitioner's position that respondents bear the burden of proof in cases such as the one before this Court. *Bailey* held that the trial court had improperly assumed facts favorable to the plaintiff (i.e., that he had moved to Arizona, and thus became subject to the running of the statute of limitations against him as a resident, only just before he filed his complaint) without holding an evidentiary hearing. It emphasized that the trial court was wrong by observing that when a complaint itself shows that the statute of limitations has run, the burden is on the plaintiff.

The *Bailey* court did *not* say that the case before it was one where the complaint apparently resolved the statute of limitations question and placed the burden of proof on plaintiff. This is clear because the ambiguity raised by the bare pleadings is the very reason the court remanded for an evidentiary hearing. If the case before it were one where the complaint resolved the issue and placed the burden of proof on the plaintiff, the court would not have reversed and remanded. This is so because, as respondent fractionators correctly pointed out in their Answering Brief before the Arizona Court of Appeals, the "trial court's disposition will be upheld if it is correct for any reason." (Respondent fractionators' Answering Brief, page 8, lines 17 to 19.)

Given the above, A Doe was shocked when he received a copy of the intermediate court's draft opinion stating:

> Plaintiffs had the burden of establishing that the discovery rule applies to delay the statute of limitations. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 155, 871 P.2d 698, 702 (App. 1993);

> *Cooney v. Phoenix Newspaper, Inc.*, 160 Ariz. 139, 141, 770 P.2d 1185, 1187 (App. 1989). "Once the defendant has established a *prima facie* case entitling him to summary judgment [on a statute of limitations defense], the plaintiff has the burden of showing available, competent evidence that would justify a trial." *Ulibarri*, 178 Ariz. at 156, 871 P.2d at 703. Plaintiffs failed to sustain that burden here. (Page 5, lines 11 to 17)

The quoted language invoked cases never cited by any of the parties, *misread* these cases as placing the burden of proof on petitioner, and placed the burden of proof on A. Doe even though he had never received any timely notice that he might have such a burden. Indeed, the only time he could have received proper, timely notice and a fair chance to respond would have been if even one of the respondents had raised a burden of proof question either in its original motion for summary judgment papers or in its reply to petitioner's response.

Nevertheless, the intermediate court's final opinion stated:

> Moreover, there is no evidence that plaintiffs did, or attempted to do, anything from 1987 to 1992 to investigate, explore or prosecute their claims. Nor did plaintiffs establish that, had they inquired and investigated their claims between 1987 and July 1991 (that is, more than two years before they filed suit), they would not have discovered the "facts" upon which their liability claims are based.

As pointed out, petitioner proffered to the Arizona Court of Appeals ample evidence that clearly disproved its assumption that A Doe would have discovered that he

had a case if he had investigated further between 1987 and July of 1991. Specifically, Petitioner begs this Court to consider the following sworn testimony proffered to the Arizona courts in petitioner's Motions for Reconsideration and To Supplement the Record (App. 22 & 31-34):

a. Terry Rice, a chemist from Maine who suffers from hemophilia and HIV: "9. I contacted a lawyer in or about Spring of 1992, but he told me that there was no case that could be made out against any defendant because I became HIV positive. 10. I know at least 20 persons with hemophilia who used commercial concentrates, became HIV positive, contacted lawyers, and were told that there was no case that could be made out against any defendant because of hemophiliacs becoming HIV positive."

b. Iowa attorney James W. Carney, who represents the Iowa State Bar Association: "2. I have been involved in transfusion blood litigation for at least ten years. 3. As late as 1993 I was still refusing to take cases of persons with hemophilia who had become infected with HIV or AIDS because of infusion of commercial factor concentrate. ***5. In the last couple of years or so I have become aware of the massive wrongdoing of the pharmaceutical companies that distributed commercial factor concentrates in the 1980's (and before)."

c. Hawaii attorney Charles Kozak, counsel of record in the *Doe* case cited immediately below: "5. It was not until the United States Court of Appeals for the Ninth Circuit reversed the District Court's grant of summary judgment in *Doe v. Cutter Biological, Inc.*, 971 F.2d 375 (9th Cir. 1993) that there was a publicized success in the

hemophilia/HIV blood litigation. ***7. In any event, I state with absolute confidence that it is true beyond a reasonable doubt that hemophilia/HIV victims in any state, who sought attorney representation for a case based on HIV infection from infusion of commercial factor concentrates in the 1980's and early 1990's, whether brought against the pharmaceutical company dispensers of the product and/or health care providers, would had [sic] less than a ten percent chance of obtaining representation regardless of the merits of their individual case."

d. Louisiana attorney Thomas Mull, who represents over 400 hemophilia/HIV victims: "8. It is my further opinion that the overwhelming majority of these HIV infected hemophiliacs were not and are not aware of the nature and extent of the misconduct of these companies with respect to their production of factor concentrates. These individuals were initially led to believe that the chances of contracting HIV from factor concentrate usage were 'one in a million' and that their HIV infection, when diagnosed, was an 'Act of God', was not preventable, would not result in contraction of the condition known as AIDS and lawsuits, if pursued would result in a world-wide shortage of factor concentrates."

e. Roy Spece, counsel upon oral argument before the Arizona Court of Appeals: "6. It was revealed in open court at a preliminary fairness hearing in the national settlement class action for hemophilia/HIV victims that although there had only been several hundred actual cases filed, over 6,000 claims were filed within the class settlement, the majority of these representing victims who had already died. 7. Doug Dalton was one of the trial attorneys in the case – described in Exhibit 29 to the

Fractionators' Statement of Facts filed in support of their statute of limitations Motions for Summary Judgment – in which the jury awarded $30 million. He was former counsel in this contingency fee case. He did not handle such cases for hemophilia/HIV victims in the 1980's or early 1990's."

f. California attorney and hemophilia/HIV victim John Marcum: "I did not suspect any wrongdoing by the factor manufacturers concerning the transmission of HIV in their product until late in 1992. At that time I contacted an attorney in California who specialized in medical malpractice and he advised me that due to the 'blood shield' laws a case against the factor manufacturers would not be successful. I eventually contacted attorney Charles Kozak in Hawaii in early 1993 and was informed by him that a case against the factor manufacturers might still be possible in spite of the blood shield laws."

g. Virginia hemophilia treatment center health care provider and hemophilia/HIV victim, Dr. Dana Kuhn: "17(q). The fractionators, who include Cutter and Armour, have been able to avoid many lawsuits by hemophiliacs who were infected by using their AHF products through use of their influence over the MASAC and the Board of Directors of the NHF. Through their influence, they were able to control the flow of information to the hemophiliac and his physician. This proved effective in keeping the treating physicians and patients relatively uninformed as to the true motives and omissions of the fractionators. Only recently have the true facts begun to emerge which have exposed the conflict of interest and misrepresentation by industry through the NHF."

The foregoing affidavits proffered to the Arizona Court of Appeals are powerful evidence that it likely would not have mattered whether A. Doe investigated further between 1987 through July 1991. (Although not presently at issue, A. Doe had previously fulfilled any duty to investigate.) He nevertheless likely would have been told that he did not have a case. The respondents' cover-up had even convinced most attorneys at that point. If this evidence were considered, the Arizona Court of Appeals would have had to have decided in A. Doe's favor under its own logic raising the relevance of what would have happened had petitioner investigated further between 1987 and July 1991.

The present case is similar to *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982). There, this Court held that the right to use a state's adjudicatory procedures pursuant to a Fair Employment Practice Act was a form of property protected by the due process clause, and that it was a denial of procedural due process to expunge that right because the state agency responsible for administering the Act failed to hold a hearing within the legislature's stipulated time limits. This Court reached its conclusion even though plaintiff had the alternative of a post-termination tort action.

In reaching this conclusion, the Court balanced the "importance of the private interest and the length or finality of the deprivation. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S., at 19, 98 S.Ct., at 1565, and *Mathews v. Eldridge*, 424 U.S. at 334-335, 96 S.Ct., at 902-03; the likelihood of governmental error, see id., at 335, 96 S.Ct., at 903; and the magnitude of the governmental interests involved, see ibid., and *Wolff v. McDonnell*, 418 U.S., at 561-563, 94 S.Ct., at 2977-2978." (Id. at 434.)

The *Logan* Court reasoned that summary adjudication of claims presents a high probability of error, that there would not be a great burden in providing a hearing, and that forcing plaintiff to pursue a post-termination tort case would be too burdensome on him.

Even much more so here, petitioner has stated causes of action that were completely expunged *with no alternative procedure available*. Allowing supplementation of the record and consideration by the Court of Appeals or the trial court would be of virtually no inconvenience to the state. (It would actually further the purposes of the state's tort laws, and it would also not prejudice respondents in any respect.) Moreover, the significance of petitioner's claim is underscored by respondents' willi gness to settle with him for $100,000.00 (*net* of attorney's fees and certain liens) even after he had been summarily tossed out of court by the intermediate appellate tribunal. If *Logan* was denied procedural due process, petitioner here certainly was too.

Another case that establishes that the failure to give petitioner timely notice of the burden of proof expected of him, or any opportunity to meet that burden once it was disclosed, is *Wolff v. McDonnell*, 418 U.S. 539 (1974). There this Court reasoned that once a state recognizes a right to good time credits for prisoners, it can deny these credits and find an infraction only after using procedures found constitutionally adequate by this Court. These include advance written *notice* of the claimed violation, written statement of fact findings, and the right to call witnesses and present documentary evidence. See also *Ponte v. Real*, 471 U.S. 491 (1988) (due process requires that prison officials must state their reasons for refusing

to call witnesses requested by an inmate facing loss of "good time").

With all due respect, petitioner here has thus far been treated worse than the prisoners in *Wolff* and *Ponte*. Petitioner was not given notice of the burden of proof (improperly) placed on him. This denied him the opportunity to present documentary evidence he could have and would have produced if he had been given proper notice. Indeed, he promptly produced an abundance of such evidence once notified that he had the burden of proof.

Petitioner was subsequently told that his case and evidence would be heard by the Arizona Supreme Court, and he reasonably relied on this when refusing a $100,000.00 settlement offer. Yet, even after oral argument before the Arizona Supreme Court, his case was finally tossed out with no explanation.

Thousands of consumers, including members of the statewide and national groups that filed amicus curiae briefs herein, are following this case. The message they are getting thus far is: "The law does not care. Your claims can be denied summarily and without explanation."

One of the primary functions of this Court is to ensure that the law is not so perverted and called into disrepute. It exists to preserve rudimentary notions of fairness and due process. This is an important opportunity to do so.

CONCLUSION

Petitioner, whose very life and health are at stake as he battles against HIV, was denied a fair opportunity to present dispositive documentary evidence. What began as the Arizona Supreme Court's apparent desire to remedy this manifest injustice turned into a cruel, albeit unwitting, representation that led petitioner to reject a $100,000.00 settlement. All this could have been avoided by a simple, inexpensive remand to the trial court to consider dispositive affidavits promptly presented by petitioner as soon as he received notice that he allegedly had the burden of providing such evidence. The scales of justice and the required procedural due process balance weigh heavily in petitioner's favor, and yet they have been tilted against him in such a way to demoralize an entire community of victims, thousands of whom are dying from the same torts visited on petitioner. This Court should tell all these people and mass tort victims generally: states are free to recognize or not to recognize causes of action, but you will never be arbitrarily denied your fair chance to attempt to vindicate such property interests as long as this Court sits.

Respectfully submitted this 14th day of September, 1998.

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

A. DOE, a single person, Plaintiff/Appellant, v. MILES INC.; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; RHONE-POULENC, INC.; ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE; STATE OF ARIZONA; DR. JAMES CORRIGAN and CAROLYN CORRIGAN; ST. JOSEPH'S HOSPITAL & MEDICAL CENTER; CATHOLIC HEALTHCARE WEST, Defendants/Appellees.	2 CA-CV 96-0166 2CA-CV 96-0167 (Cons.) Department A MEMORANDUM DECISION Not for Publication Rule 28(a)(2), Rules of Civil Appellate Procedure
JANE DOE, as Personal Representative of the Estate of B. DOE, deceased child of Jane Doe, for and on behalf of herself and on behalf of the Estate, and in her individual capacity, Plaintiff/Appellant, v.	

MILES INC.; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; RHONE-POULENC, INC.; ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE; STATE OF ARIZONA; DR. JAMES CORRIGAN and CAROLYN CORRIGAN; ST. JOSEPH'S HOSPITAL & MEDICAL CENTER; CATHOLIC HEALTHCARE WEST,

Defendants/Appellees.

APPEAL FROM THE SUPERIOR COURT
OF PIMA COUNTY

Cause Nos. 295251 and 295223

Honorable Robert B. Buchanan, Judge

AFFIRMED

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PELANDER, Presiding Judge

In these consolidated actions, plaintiffs/appellants Jane Doe and her son, A. Doe, contend the trial court erred in granting summary judgment for defendants/appellees on statute of limitations grounds. We disagree and therefore affirm.

We view the evidence in the light most favorable to the parties against whom summary judgment was entered and independently review any questions of law relating to the statute of limitations defense. *Owens v. City of Phoenix*, 180 Ariz. 402, 405, 884 P.2d 1100, 1103 (App. 1994); *Zuck v. State*, 159 Ariz. 37, 39, 764 P.2d 772, 774 (Ap. 1988). Jane Doe's twin sons, A. Doe and B. Doe, were diagnosed with mild hemophilia shortly after their births

in 1969.[1] Their medically-prescribed treatment from 1978 to 1987 included infusion of "factor VIII concentrate,"[2] a blood coagulant used to control and stop bleeding in hemophiliacs. Both A. and B. contracted human immunodeficiency virus (HIV) from the factor concentrate infusions. B. tested positive in July 1987 and ultimately died of acquired immune deficiency syndrome (AIDS) in April 1989. A. also was diagnosed with HIV after testing positive in August 1987.[3]

In July 1993, plaintiffs Jane Doe (on behalf of herself and B. Doe's estate) and A. Doe filed separate actions against defendants/appellees – various producers of factor concentrates ("fractionators") and healthcare providers who allegedly were involved in the hemophilia care of A. and B. Plaintiffs alleged negligence and product liability theories against the various defendants. Defendants eventually moved for summary judgment on

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[1] Hemophilia is a genetically-transmitted bleeding disorder characterized by a lack of certain proteins which are essential to blood clotting.

[2] Factor concentrates are blood products derived through a process called "fractionation" from mass-pooled human plasma collected from many donors. Due to their multiple-donor sources, factor concentrates posed a much greater risk of transmitting blood-borne diseases than fresh-frozen plasma (FFP) or cryoprecipitate, a product derived from FFP when it thaws. All factor concentrate A. and B. received by infusion from 1978 to 1987 was acquired from defendant/appellee St. Joseph's Hospital in Phoenix and a few other institutions and was prescribed by two Phoenix hemotologists whom plaintiffs named as defendants but who are not parties to this appeal.

[3] Although A. Doe is HIV-positive, he does not have AIDS or any AIDS-related symptoms.

the basis that plaintiffs' claims were time-barred under A.R.S. §12-542. The trial court granted the motion, and this appeal followed.

We must determine *de novo* whether there are any genuine issues of material fact relating to the limitations defense and whether the trial court erred in applying the law. *United Bank v. Allyn*, 167 Ariz. 191, 805 P.2d 1012 (App/190). Section 12-542 required that plaintiffs' actions be "commenced and prosecuted within two years after the cause of action accrue[d], and not afterward." Under the common law "discovery rule," a cause of action accrues "when the plaintiff knew or by the exercise of reasonable diligence should have known of the defendants' conduct and therefore the statute of limitations does not begin to run until that time." *Mayer v. Good Samaritan Hosp.*, 14 Ariz. App. 248, 252, 482 P.2d 497, 501 (1971). See also *Vega v. Morris*, 184 Ariz. 461, 463, 910 P.2d 6, 9 (1996). In other words, "the claim is barred two years from when the plaintiff knew or should have known facts giving rise to the claim." *Anson v. American Motors Corp.*, 155 Ariz. 420, 424, 747 P.2d 581, 585 (App. 1987).

Plaintiffs had the burden of establishing that the discovery rule applied to delay the statute of limitations. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 155, 871 P.2d 698, 702 (App. 1993); *Cooney v. Phoenix Newspapers, Inc.*, 160 Ariz. 139, 141, 770 P.2d 1185, 1187 (App. 1989). "Once the defendant has established a *prima facie* case entitling him to summary judgment [on a statute of limitations defense], the plaintiff has the burden of proof showing available, competent evidence that would justify a trial." *Ulibarri*, 178 Ariz. at 156, 871 P.2d at 703. Plaintiffs failed to sustain that burden here.

The record shows that in 1987, when both A. and B. tested positive for and were diagnosed with HIV, Jane Doe believed they had contracted the virus from factor concentrates. As early as 1983, she also received, read and retained newsletters and special bulletins which informed her of the link between factor concentrate and HIV/AIDS. Similarly, A. Doe "firmly believed [as of August, 1997] that the only possible source of [his] HIV infections was factor concentrate" he had received through infusions. Both Jane and A. attributed B.'s death to AIDS resulting from his HIV, which they in turn linked to the factor concentrate. A. realized at that time that HIV could lead to AIDS, which could kill him. Finally, plaintiffs knew in 1987 of the healthcare provider/defendants' role in A.'s and B.'s hemophilia care and either knew or easily could have discovered who had produced, distributed and supplied the factor concentrates.

Notwithstanding those undisputed facts, plaintiffs contend their cause of action did not accrue until late 1992, when A. Doe first "saw documents" at a National Hemophilia Foundation meeting and "heard from people that there was reason to believe that the fractionators were negligent with regard to transmission of HIV."[4] It was at that meeting and when he later received additional documents that A. "came to the conclusion that – that there was something wrong." Similarly, before 1992, Jane Doe was unaware of any wrongdoing associated with hemophiliacs becoming infected with HIV after

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[4] There is no indication in the record that plaintiffs learned any new "facts" after 1987 about the healthcare provider/defendants' conduct in their care of A. or B.

infusion of factor products or that they may have been "defective."

According to plaintiffs, a cause of action for medical negligence does not accrue until the plaintiff knows of, or "reasonably should suspect," defendant's fault, i.e., negligence, breach of duty or other tortious wrongdoing. Because plaintiffs did not realize that defendants were negligent or otherwise at fault until 1992, they contend filing their suits in July 1993 was timely. We disagree. Accepting plaintiffs' proposition would essentially gut the statute of limitation defense. If commencement of the limitations period depended on a plaintiff's subjectively and fortuitously "discovering" or "realizing" a putative defendant's fault, even long after the plaintiff knew the facts about that defendant's identity and relationship to plaintiff, plaintiff's injury and causation, the defense would be virtually meaningless.

As Division One of this court has stated:

> [A] cause of action "accrues" when the plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by a *particular* defendant's negligent conduct. The cause of action does not accrue until the plaintiff knows or should have known of both the *what* and *who* elements of causation.

Lawhon v. L.B.J. Institutional Supply, Inc., 159 Ariz. 179, 183, 765 P.2d 1003, 1007 (App. 1988) (emphasis in original). Those discovery elements existed here more than two years before plaintiffs filed suit in these cases. They knew by 1987 of the injury (HIV), what caused the injury (factor concentrate) and who allegedly caused the injury

(various fractionators which produced and distributed the factor concentrate and various healthcare providers who prescribed, provided or recommended factor concentrate for A. and B. or who evaluated its use). That plaintiffs did not subjectively know or have reason to know of defendants' alleged negligence, breach of duty or product defectiveness until 1992 did not postpone accrual of their claims until then. As this court has noted, "[t]he discovery rule applies to the facts which give rise to the cause of action, not to the legal significance of such facts." *Kowske v. Life Care Centers of American, Inc.*, 176 Ariz. 535, 537, 863 P.2d 254, 256 (App. 1993), *quoting Insurance Company of North American v. Superior Court*, 162 Ariz. 499, 502, 784 P.2d 705, 708 (App. 1989), *vacated in part on other grounds*, 166 Ariz. 82, 800 P.2d 585 (1990).

"[S]tatutes of limitations are designed to encourage plaintiffs to pursue claims diligently and to prevent the assertion of stale and fraudulent claims." *Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996). "[T]he discovery rule developed as a tool to mitigate the harshness of applying the statute to a plaintiff who could not have known any of the facts underlying the cause of action." *Doe v. Roe*, ___ Ariz. ___, ___ P.2d ___, 222 Ariz. Adv. Rep. 17, 18 (Ct.App. August 8, 1996). Our supreme court has noted, however, that "the important inquiry in applying the discovery rule is whether the plaintiff's injury or the conduct causing the injury is difficult to detect." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co.*, 182 Ariz. 585, 590, 898 P.2d 964, 969 (1995). There was no such showing here; on the contrary, plaintiffs were aware of all pertinent facts concerning their injury and causation by 1987.

Moreover, there is no evidence that plaintiffs did, or attempted to do, anything from 1987 to 1992 to investigate, explore or prosecute their claims. Nor did plaintiffs establish that, had they inquired and investigated their claims between 1987 and July 1991 (that is, more than two years before they filed suit), they would not have discovered the "facts" upon which their liability claims are based. When plaintiffs began investigating and obtaining more information in late 1992 and 1993, they acknowledge that "[i]t then became apparent to both of [them] that the blood companies might have been negligent," and therefore they contacted counsel in June 1993. Plaintiffs were required to exercise reasonable diligence to explore all relevant facts concerning A.' and B.'s HIV, B's resulting AIDS and death, and their cause. *Doe v. Roe*, 222 Ariz. Adv. Rep. at 18-19. Doing absolutely nothing for over five years to investigate a claim is not reasonable diligence under any definition of those words. Whatever "reasonable diligence" may or may not require under different circumstances, here it required more than fortuitously learning of possible wrongdoing by known health care providers more than five years after plaintiffs had actual knowledge of all other pertinent facts.

Other courts, including the United States Supreme Court, have rejected claims similar to plaintiffs'. In *United States v. Kubrick*, 444 U.S. 111, 100 S. Ct. 352, 62 L.Ed.2d 259 (1979), the issue was whether a claim accrues under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), "when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts aflicting [sic] the injury may constitute medical malpractice." *Kubrick*, 444 U.S. at 113, 100 S.Ct. at 355, 62 L.Ed.2d

at 264. With reasoning we find persuasive, the Supreme Court adopted the former proposition:

> We are convinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the punitive defendant, unavailable to the plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter.
>
> We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. . . . If advised that he has been wronged, he may promptly bring suit. If competently advised to the contrary, he may be dissuaded, as he should be, from pressing a baseless claim. Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, as the experts proved to be on the trial of this case. But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make.

Id., at 122-125, 100 S.Ct. at 359-360, 62 L.Ed.2d at 269-270. See also *Schaefer v. Gulf Coast Regional Blood Ctr.*, 10 F.3d

327, 332 (5th Cir. 1994) (plaintiff's cause of action accrued no later than the time plaintiff learned of his HIV-positive status); *Smith v. American Red Cross*, 876 F.Supp. 64, 68 (E.D.Pa. 1994) ("[U]nder the discovery rule, the statute of limitations was tolled until . . . the day [plaintiff] learned both that she was HIV positive and the cause of her illness."); *Doe v. Cutter Biological*, 844 F.Supp. 602, 608 (D. Idaho 1994) (positive HIV test is objective proof of injury and statute of limitations begins to run at that time.); *Doe v. Cutter Biological*, 813 F. Supp. 1547, 1554 n.3 (M.D. Fla. 1993), *aff'd*, 66 F.3d 342 (11th Cir. 1995) (plaintiff suing because of HIV infection "need only be aware of exposure to the product so as to suggest a causation."); *Mack v. A.H. Robins Co., Inc.*, 573 F.Supp. 149, 154 (D.Ariz. 1983), *aff'd*, 759 F.2d 1482 (9th Cir. 1985) (knowledge "of the defendant's improper conduct or defect in the product is not required in Arizona," and "a cause of action accrues once the plaintiff knows of the injury and the causal connection between the defendant's product and that injury"); *Murray v. Hamot Medical Ctr.*, 429 Pa. Super. 625, 633 A.2d 196 (1993).

The foregoing principles are consistent with Arizona law and apply to bar plaintiffs' claims in this case. See *Doe v. Roe*, 222 Ariz. Adv. Rep. at 19 ("[T]he discovery rule delays accrual of a cause of action only until the claimant knows, or by the exercise of reasonable diligence should know, that the defendant harmed [him or] her," and "it is not necessary for a claimant to know all the facts for the statute to begin to run; rather, all that is required is that he [or she] know enough facts as would prompt a reasonable person to investigate and discover the full extent of the claim"); *Floyd v. Donahue*, ___ Ariz.

___, 923 P.2d 875, 878 (App. 1996), *quoting Mayer*, 14 Ariz. App. at 252, 482 P.2d at 501 ("The discovery rule delays accrual until the plaintiff has reason to know 'by exercise of reasonable diligence' that defendant harmed her."). Because plaintiffs knew or by the exercise of reasonable diligence should have known of all pertinent facts (as opposed to their legal significance) more than two years before filing suit, the trial court properly granted summary judgment for defendants.

Plaintiffs' reliance on *Anson* and *Commercial Union Ins. Co. v. Lewis and Roca*, 183 Ariz. 250, 902 P.2d 1354 (App. 1995) is misplaced. Those cases do not hold that a plaintiff must know or reasonably suspect that a putative defendant was negligent or at fault before plaintiff's cause of action accrues for limitations purposes. In *Anson*, which involved appeal from a dismissal under Ariz. R. Civ. P. 12(b)(6), 16 A.R.S., the court determined that Arizona's constitution requires the discovery rule to apply to wrongful death claims as well as other tort actions. The court recognized that a claim "is barred two years from when the plaintiff knew or should have known facts giving rise to the claim." *Anson*, 155 Ariz. at 424, 747 P.2d at 585. The plaintiffs in *Anson* alleged "they had no knowledge of important facts related to the cause of death of their son, and were not sufficiently aware of the causal relationship between the defects in the jeep and their son's death to file a claim." *Id.* at 427, 747 P.2d at 589. Here, in contrast, plaintiffs admittedly knew in 1987 of the causal link between factor concentrates and HIV, and knew by no later than 1989 of the causal link with AIDS. Finally, the court in *Anson* reversed primarily because of factual issues concerning the defendant's

alleged fraudulent concealment which, as noted below, are lacking in this case.

Commercial Union was a legal malpractice case in which the "controlling issue" was "when [the plaintiff] became aware or should have become aware of the cause of its harm." *Commercial Union*, 183 Ariz. at 256, 902 P.2d at 1360. The court focused on the point at which the plaintiff's injury was sufficiently definite and ascertainable for the limitations period to commence. Again, plaintiffs in this case knew when A. and B. were diagnosed HIV positive in 1987 that the factor concentrates had caused them appreciable harm.

We summarily dispose of plaintiffs' remaining contentions. Plaintiffs presented no genuine issues of material fact as to whether the fractionator defendants, let alone the other defendants, "wrongfully concealed facts giving rise to the cause of action in such a manner as to prevent [plaintiffs] from reasonably discovering a claim exists within the limitations period." *Anson*, 155 Ariz. at 426, 747 P.2d at 587. Thus, their fraudulent concealment claim did not preclude summary judgment. See *Cooney*, 160 Ariz. at 141, 770 P.2d at 1187 (alleged fraudulent concealment did not toll the statute of limitations when plaintiff demonstrated no "positive act by the defendant taken for the purpose of preventing detection of the cause of action"). Finally, we cannot say the trial court abused its discretion in denying plaintiffs' request for additional time for discovery under Ariz. R. Civ. P. 56(f), 16 A.R.S., given the deficiencies and lack of specificity in plaintiffs'

affidavit and the active litigation of the case for over two years before defendants moved for summary judgment.

Affirmed.

/s/ _____
JOHN PELANDER,
Presiding Judge

CONCURRING:

/s/ _____
WILLIAM E. DRUKE,
Chief Judge

/s/ _____
JAMES E. DON, Judge*

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* A judge of the Pinal County Superior Court authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order dated January 21, 1997.

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

March 21, 1997

RE: A. DOE v. MILES
2 CA-CV 96-0166
2 CA-CV 96-0167
Pima County Superior Court Cause Nos. 295251, 295223

The following action was taken by the Court of Appeals for the State of Arizona, Division Two, Department A on March 21, 1997,

ORDERED: Appellants' Motion for Reconsideration and Motion for Order Allowing Supplementation of Record is DENIED.

Chief Judge Druke, Judge Don and Judge Pelander participated in the determination of this matter.

JOYCE A. GOLDSMITH, Clerk

(service list omitted)

Supreme Court

STATE OF ARIZONA
NOEL K. DESSAINT
CLERK OF COURT
KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329

TELEPHONE: (602) 542-9396

November 17, 1997

RE: A. DOE/JANE DOE vs. MILES INC/ARMOUR PHARMACEUTICAL CO et al

Supreme Court No. CV-97-0194-PR
Court of Appeals Nos. 2 CA-CV 96-0166 and 2 CA-CV 96-0167
[Consolidated]
Pima County Nos. 295251 and 295223

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 14, 1997, in regard to the above-referenced cause:

ORDERED: State Defendants' Motion to Strike [portions of Petitioner's appendix to Petition for Review] = DENIED.

FURTHER ORDERED: Petition for Review = GRANTED.

FURTHER ORDERED: The case shall be set for oral argument.

Counsel shall be advised of the date and time of oral argument at such time as the hearing date is determined.

The Clerk of the Court of appeals, Division Two, Tucson, shall forward the remaining record to the Clerk of the Supreme Court.

NOEL K. DESSAINT, Clerk

(service list omitted)

SUPREME COURT OF ARIZONA

A. DOE, a single person, Plaintiff/Appellant, v. MILES INC.; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; ALPHA THERAPEUTIC CORPORATION; RHONE-POULENC, INC.; ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE; STATE OF ARIZONA; DR. JAMES CORRIGAN and CAROLYN CORRIGAN; ST. JOSEPH'S HOSPITAL & MEDICAL CENTER; CATHOLIC HEALTHCARE WEST, Defendants-Appellees.	Supreme Court No. CV-97-0194-PR Court of Appeals No. 2 CA-CV 96-0166 and 2 CA-CV 96-0167 [Consolidated] Pima County Nos. 295251 and 295223
JANE DOE, as Personal Representative of the Estate of B. DOE, deceased child of Jane Doe, for and on behalf of herself and on behalf of the Estate, and in her individual capacity, Plaintiff/Appellant, v. MILES INC.; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; ALPHA THERAPEUTIC CORPORATION; RHONE-POULENC, INC.;	

ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE; STATE OF ARIZONA; DR. JAMES CORRIGAN and CAROLYN CORRIGAN; ST. JOSEPH'S HOSPITAL & MEDICAL CENTER; CATHOLIC HEALTHCARE WEST,	)	ORDER
Defendants/Appellees.	)	(Filed May 1, 1998)

After hearing oral argument and considering further the pleadings filed, it appears to the Court that the grant of review in this case was improvident. Therefore,

IT IS ORDERED that the order granting review is vacated.

IT IS FURTHER ORDERED that the Petition for Review is dismissed.

IT IS FURTHER ORDERED that the Court of Appeals' Opinion shall not be published, pursuant to Rule 111(g), Arizona Rules of the Supreme Court.

Justice Martone joins in the order dismissing the Petition for Review but dissents from that part of the order requiring depublication of the Court of Appeals Opinion.

DATED this 1st day of May, 1998.

/s/ Charles E. Jones
CHARLES E. JONES
Vice Chief Justice

Record returned to Court of Appeals, Division One, Phoenix, this 1st day of May, 1998.

(service list omitted)

SUPREME COURT OF ARIZONA

A. DOE, a single person, Plaintiff/Appellant, v. MILES INC.; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE CORPORATION; RHONE-POULENC, INC.; ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE; STATE OF ARIZONA; DR. JAMES CORRIGAN and CAROLYN CORRIGAN; ST. JOSEPH'S HOSPITAL & MEDICAL CENTER; CATHOLIC HEALTHCARE WEST, Defendants/Appellees.	) Supreme Court) No. CV-97-0194-PR)) Court of Appeals) No. 2 CA-CV 96-0166) and 2 CA-CV 96-0167) [Consolidated])) Pima County) Nos. 295251) and 295223)) ORDER
JANE DOE, as Personal Representative of the Estate of B. DOE, deceased child of Jane Doe, for and on behalf of herself and on behalf of the Estate, and in her individual capacity, Plaintiff/Appellant, v. MILES INC.; ARMOUR PHARMACEUTICAL CO.; BAXTER HEALTHCARE	)

CORPORATION; RHONE-POULENC, INC.; ARIZONA BOARD OF REGENTS; UNIVERSITY OF ARIZONA; UNIVERSITY OF ARIZONA COLLEGE OF MEDICINE; STATE OF ARIZONA; DR. JAMES CORRIGAN and CAROLYN CORRIGAN; ST. JOSEPH'S HOSPITAL & MEDICAL CENTER; CATHOLIC HEALTHCARE WEST,

Defendants/Appellees.

Plaintiff/Appellant A. Doe and Plaintiff/Appellant Jane Doe have filed Appellants' Verified Motion for Reconsideration Of Order Vacating, As Improvidently Granted, Decision Accepting Their Petition For Review; Concurrent Jurisdictional motions To Allow Consideration of Motion For Reconsideration.

The Court has considered the motions. Now, therefore, IT IS HEREBY ORDERED that the Concurrent Jurisdictional Motions To Allow Consideration Of Motion For Reconsideration are GRANTED.

IT IS FURTHER ORDERED that Appellants' Verified Motion For Reconsideration Of Order Vacating, As Improvidently Granted, Decision Accepting Their Petition For Review is DENIED.

Dated this ___ day of June, 1998.

FREDRICK C. MARTONE
Duty Justice

(service list omitted)

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Attorneys for Plaintiffs/Appellants

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

A Doe, a single person, and Jane Doe, etc.,	) Nos. 2 CA-CV 96-0166) and 2 CA-CV 96-0167
Plaintiffs/Appellants,	) Department A
vs.	) (Pima County Superior
Miles Inc., et al.,	) Court No. 295251)
Defendants/Appellees.	) **APPELLANTS' MOTION FOR RECONSIDERATION AND MOTION FOR ORDER ALLOWING SUPPLEMENTATION OF RECORD**

Reserving their rights to raise in any subsequent proceedings all points previously argued, plaintiffs hereby move the Court to reconsider its decision on the limited grounds of (1) burden of proof first being raised and placed on them *on appeal* and (2) what plaintiffs would have discovered had they conducted further inquiry between 1987 and July, 1991; and they further

move the Court for an Order allowing them to supplement the record with the affidavits of several attorneys and hemophilia/HIV/AIDS victims in Arizona and throughout the country (submitted in similar Arizona state court hemophilia/HIV/AIDS cases at the trial court level and attached hereto as Appendix "A") showing that there is a virtual certainty that plaintiffs would have been told that they did not have a case regardless of how much additional investigation they had conducted in 1987 through July, 1991 (and even later). The bases of plaintiffs' Motions are more fully set forth in the Memorandum of Points and Authorities attached hereto.

RESPECTFULLY SUBMITTED this [5th] day of March, 1997.

IBÁÑEZ & WILKINSON

By: _____

Rose Marie Ibáñez
Attorneys for Appellants

MEMORANDUM OF POINTS AND AUTHORITIES

I. THIS COURT'S DECISION IS BASED ON PLAINTIFFS' FAILURE TO MEET THE BURDEN OF PROOF, BUT THIS IS IMPROPER AND UNFAIR BECAUSE: (1) DEFENDANTS NEVER CONTRADICTED PLAINTIFFS' CORRECT STATEMENT OF THE LAW BEFORE THE TRIAL COURT THAT DEFENDANTS' MOTIONS COULD NOT BE GRANTED BECAUSE DEFENDANTS HAD NOT MET THEIR BURDEN OF PROVING THAT THERE WAS NO TRIABLE ISSUE OF FACT AND THAT JUDGMENT SHOULD BE ENTERED IN THEIR FAVOR AS A MATTER OF LAW; AND (2) PLAINTIFFS COULD HAVE MET (AND NOW DO MEET WITH THE AFFIDAVITS SUBMITTED HEREWITH) THE BURDEN OF PROOF HAD ANY DEFENDANT TIMELY SUGGESTED PLAINTIFFS BORE IT.

A. Factual Background

Each defendant made or joined in another defendants' motion for summary judgment at the trial court level, and each motion was based on the argument that facts defendants put on the record demonstrated that there was no triable issue of fact regarding plaintiffs' knowledge of injury, what caused their injuries, and who caused their injuries. (Index of Record on Appeal, "IRA," #'s 72, 73, 74, 78, & 79.) Plaintiffs filed an "Omnibus Response," arguing that defendants had not met their burden of proving that there was no triable issue of fact and that they were entitled to judgment as a matter of law. (IRA #86, at, for example, page 17, lines 12 to 16.) Defendants each replied by reaffirming their argument that facts on the record demonstrated that there was no triable issue of fact. *None of them ever alleged, either in their*

initial Motion papers or in their Replies, that plaintiffs had the burden of proof. Had defendants done so, plaintiffs would have answered with citation of authority and affidavits that would have anticipated a possible ruling against them on the burden of proof issue.

The Case Management Order at the trial court level afforded all the defendants a "joint defense privilege" despite plaintiffs objection thereto. (IRA #69.) The fractionator defendants "carried the ball" for most of the litigation as they did at the oral argument on this appeal. It is most significant, therefore, that, even in their Answering Brief, the defendant fractionators did not attempt to assert that plaintiffs had the burden of proof. Rather, they conceded plaintiffs' statement of the proper standard of review in plaintiffs' Opening Brief as being "essentially *de novo*." (Page 15, lines 18 to 20.) Specifically, the fractionator defendants stated in their Answering Brief: "On appeal from summary judgment, this Court determines *de novo* whether any genuine issue of material fact exists and whether the trial court erred in its application of the law." (Page 8, lines 15 to 17.)

The first and only attempt by any defendant to hint that plaintiffs might have the burden of proof was in the State Defendants' Answering Brief, wherein they cryptically stated: "Appellant correctly states that this Court should view the evidence in the light most favorable to the party opposing summary judgment. Appellant, however, improperly places the burden of proof on the State Defendants. By law, it is Appellant's burden to show the statute of limitations has been tolled. *Bailey v. Superior Court*, 143 Ariz. 494, 498, 694 P.2d 324, 328 (1985)." (Page 11, lines 6 to 10.)

Given that the fractionator defendants had conceded plaintiffs' assertion of the proper standard of review in the Answering Brief and that all parties at the trial court level had assumed defendants had the burden of proof, plaintiffs did not even see any need to respond to the State Defendants' improper invocation of *Bailey v. Superior Court*. (That case in fact supports *plaintiffs'* position that defendants bear the burden of proof in cases such as the one before this Court. The *Bailey* court held that the trial court had improperly assumed facts favorable to the *plaintiff* (i.e., that he had moved to Arizona, and thus became subject to the running of the statute of limitations against him as a resident, only just before he filed his complaint) without holding an evidentiary hearing. It emphasized that the trial court was wrong by observing that when a complaint itself shows that the statute of limitations has run, the burden in [sic] on the plaintiff.

The *Bailey* court did *not* say that the case before it was one where the complaint apparently resolved the statute of limitations question and placed the burden of proof on plaintiff. This is clear because the ambiguity raised by the bare pleadings is the very reason the court remanded for an evidentiary hearing. If the case before it were one where the complaint resolved the issue and placed the burden of proof on the plaintiff, the court would not have reversed and remanded. This is so because, as defendant fractionators correctly point out in their Answering Brief herein, the "trial court's disposition will be upheld if it is correct for any reason." (Defendant Fractionators' Answering Brief, page 8, lines 17 to 19.) [)]

Given the above, plaintiffs were shocked when they received a copy of this Court's draft opinion stating:

> Plaintiffs had the burden of establishing that the discovery rule applies to delay the statute of limitations. *Ulibarri v. Gerstenberger*, 178 Ariz. 151, 155, 871 P.2d 698, 702 (App. 1993); *Cooney v. Phoenix Newspapers, Inc.*, 160 Ariz. 139, 141, 770 P.2d 1185, 1187 (App. 1989). "Once the defendant has established a *prima facie* case entitling him to summary judgment [on a statue of limitations defense], the plaintiff has the burden of showing available, competent evidence that would justify a trial." *Ulibarri*, 178 Ariz. at 156, 871 P.2d at 703. Plaintiffs failed to sustain that burden here. (Page 5, lines 11 to 17.)

The quoted language invoked cases never cited by any of the parties, and it placed the burden of proof on plaintiffs even though they had never received any timely notice that they might have such a burden. Indeed, the only time they could have received proper, timely notice and a fair chance to respond would have been if even one of the defendants had raised a burden of proof question either in its original motion for summary judgment papers or in its reply to plaintiffs' response.

After receiving the draft opinion, plaintiffs did the best they could by attempting on oral argument to demonstrate to the Court, through analysis of the cases that it incorrectly invoked, that the law is precisely as stated in *Bailey v. Superior Court*, above, i.e., plaintiffs do not have the burden of proof regarding the statute of limitations unless – as is *not* the case here – the complaint itself establishes that the statute of limitations has run. (See copies of illustrative charts 5 and 6 distributed to the

Court upon oral argument and attached hereto as Appendices "B" and "C".)

Nevertheless, this Court's final opinion states:

> Moreover, there is no evidence that plaintiffs did, or attempted to do, anything from 1987 to 1992 to investigate, explore or prosecute their claims. Nor did plaintiffs establish that, had they inquired and investigated their claims between 1987 and July 1991 (that is, more than two years before they filed suit), they would not have discovered the "facts" upon which their liability claims are based. When plaintiffs began investigating and obtaining more information in late 1992 and 1993, they acknowledged that "[i]t then became apparent to both of [them] that the blood companies might have been negligent," and therefore they contacted counsel in June 1993. Plaintiffs were required to exercise reasonable diligence to explore all relevant facts concerning A.'s and B.'s HIV, B.'s resulting AIDS and death, and their cause. *Doe v. Roe*, 222 Ariz. Adv. Rep. at 18-19. Doing absolutely nothing for over five years to investigate a claim is not reasonable diligence under any definition of those words. Whatever "reasonable diligence" may or may not require under different circumstances, here it required more than fortuitously learning of possible wrongdoing by known health care providers more than five years after plaintiffs had actual knowledge of all other pertinent facts.
>
> (Page 7, line 18 to page 8, line 10.)

Plaintiffs respectfully note that the Court's reasoning is extremely harsh to the extent of denying fundamental due process of law. Whether or not plaintiffs are correct

regarding their reading of the precedents regarding the burden of proof, no reasonable legal system can expect them to have assumed they might have the burden of proof at the trial court level when they argued that the defendants had the burden of proof as to defendants' affirmative defense of statute of limitations *and not one defendant contradicted plaintiffs in either its original motion for summary judgment papers or in its reply.*

Throwing plaintiffs out of Court on burden of proof grounds when they had no reason to believe they might have the burden of proof is especially Draconian because: (1) this is literally a matter of life and death to plaintiff A Doe; *and* (2) plaintiffs could and would have met the burden of proof had anyone at the trial court level argued that they had the burden of proof. At the very least, this Court should, as in *Bailey v. Superior Court,* above, remand for an evidentiary hearing. However, plaintiffs respectfully submit that the Court should instead consider the affidavits submitted herewith as Appendix "A" and reverse the trial court's decision. The reasons for such an action are the subject of Section II. of this Memorandum immediately below.

II. PLAINTIFFS DID ALL THE INVESTIGATION THAT COULD HAVE BEEN REASONABLE [sic] EXPECTED OF THEM, AND, IF THEY HAD DONE FURTHER INVESTIGATION AT ANY TIME BETWEEN 1987 AND JULY 1991, THERE IS A HIGH PROBABILITY THAT THEY WOULD HAVE BEEN TOLD THAT THEY DID NOT HAVE A CASE

It is respectfully submitted that the Court has overlooked a crucial part of the record when asserting that plaintiffs did "absolutely nothing for over five years to investigate" their claims. The Court has ignored a crucial fact that plaintiffs unsuccessfully attempted to emphasize: *they inquired of their trusted hematologist physician as to whether there was anything that could have been done to avoid their injuries, and they were told that nothing could have been done.* (Opening Brief, page 9, lines 16 to 23.)

It is respectfully submitted that a reasonable jury could find that plaintiffs were not unreasonable because they chose to believe their trusted physician and did not attempt to investigate further to show him to be misrepresenting the truth. Who other than an expert hematologist could have been expected to have more information? Indeed, as plaintiffs pointed out in oral argument – based on their written citation to "In the Matter of Rhone-Poulenc Rorer Incorporated, 51 [F.]3d 1293 (7th Cir. 1995) (2,000 of nation's 20,000 hemophiliacs have died from AIDS and 10,000 more may be HIV positive, but only 300 suits have been filed.)" – the reported case law demonstrates that only a tiny percentage of the thousands of hemophilia/HIV/AIDS victims pursued their causes of action prior to September of 1993. Why should one

assume that all reasonable juries would find 90+ percent of hemophiliacs, albeit sometimes physically handicapped, to have been and to be "unreasonable?"

The above is enough to raise a triable issue of fact given the procedural posture of this case and the present record. However, in addition plaintiffs submit as Appendix "A" hereto the affidavits of several attorneys and hemophilia/HIV/AIDS victims from Arizona and all over the country that demonstrate that there is a high probability that plaintiffs would have been told that they did not have a case if they had conducted further inquiry at any time between 1987 and July of 1991.[1]

Plaintiffs beg the Court to consider the following sworn testimony:

a. Terry Rice, a chemist from Maine who suffers from hemophilia and HIV: "9. I contacted a lawyer in or about Spring of 1992, but he told me that there was no case that could be made out against any defendant because I became HIV positive. 10. I know at least 20 persons with hemophilia who used commercial concentrates, became HIV positive, contacted lawyers, and were told that there was no case that could be made out

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[1] These same affidavits have been submitted in other Arizona state court hemophilia/HIV/AIDS cases, litigated later than the cases of plaintiffs herein and in which the burden of proof issue has been explicitly raised at the trial court level. Although in most, but not all, of those cases the defendants are still objecting to the affidavits as not being filed with plaintiffs' initial Responses; it is likely that they will be considered on appeal. It would therefore be especially unfair for the Court to ignore the affidavits insofar as they support the plaintiffs presently before the Court.

against any defendant because of hemophiliacs becoming HIV positive."

b. Iowa attorney James W. Carney, who represents the Iowa State Bar Association: "2. I have been involved in transfusion blood litigation for at least ten years. 3. As late as 1993 I was still refusing to take cases of persons with hemophilia who had become infected with HIV or AIDS because of infusion of commercial factor concentrate.***5. In the last couple of years or so I have become aware of the massive wrongdoing of the pharmaceutical companies that distributed commercial factor concentrates in the 1980's (and before)."

c. Hawaii attorney Charles Kozak, as counsel of record in the *Doe* case cited immediately below: "5. It was not until the United States Court of Appeals for the Ninth Circuit reversed the District Court's grant of summary judgment in Doe v. Cutter Biological, Inc., 971 F.2d 375 (9th Cir. 1993) that there was a publicized success in the hemophilia/HIV/AIDS blood litigation.***7. In any event, I state with absolute confidence that it is truly beyond a reasonable doubt that hemophilia/HIV victims in any state, who sought attorney representation for a case based on HIV infection from infusion of commercial factor concentrates in the 1980's and early 1990's, whether brought against the pharmaceutical company dispensers of the product and/or health care providers, would had [sic] less than a ten percent chance of obtaining representation regardless of the merits of their individual case."

d. Louisiana attorney Thomas Mull, who represents over 400 hemophilia/HIV victims: "8. It is my further

opinion that the overwhelming majority of these HIV infected hemophiliacs were not and are not aware of the nature and extent of the misconduct of these companies with respect to their production of factor concentrates. These individuals were initially led to believe that the chances of contracting HIV from factor concentrate usage were 'one in a million' and that their HIV infection, when diagnosed, was an 'Act of God,' was not preventable, would not result in contraction of the condition known as AIDS and lawsuits, if pursued, would result in a world-wide shortage of factor concentrates."

e. Roy Spece, counsel upon oral argument herein: "6. It was revealed in open court at a preliminary fairness hearing in the national settlement class action for hemophilia/HIV victims that although there had only been several hundred actual cases filed, over 6,000 claims were filed within the class settlement, the majority of these representing victims who had already died. 7. Doug Dalton was one of the trial attorneys in the case – described in Exhibit 29 to the Fractionators Statement of Facts filed in support of their statute of limitations Motions for Summary Judgement – in which the jury awarded $30 million. He was former counsel in this contingency fee case. He did not handle such cases for hemophilia/HIV victims in the 1980's or early 1990's."

f. California attorney and hemophilia/HIV victim John Marcum: "I did not suspect any wrongdoing by the factor manufacturers concerning the transmission of HIV in their product until late in 1992. At that time I contacted an attorney in California who specialized in medical malpractice and he advised me that due to the 'blood shield' laws a case against the factor manufacturers would not be

successful. I eventually contacted attorney Charles Kozak in Hawaii in early 1993 and was informed by him that a case against the factor manufacturers might still be possible in spite of the blood shield laws."

g. Virginia hemophilia treatment center health care provider and hemophilia/HIV victim, Dr. Dan Kuhn: "17(q). The fractionators, which include Cutter and Armour, have been able to avoid many lawsuits by hemophiliacs who were infected by using their AHF products through use of their influence over the MASAC and the Board of Directors of the NHF. Through their influence, they were able to control the flow of information to the hemophiliac and his physician. This proved effective in keeping the treating physicians and patients relatively uninformed as to the true motives and omissions of the fractionators. Only recently have the true facts begun to emerge which have exposed the conflict of interest and misrepresentations by industry through the NHF."

Plaintiffs respectfully request that the Court read the affidavits attached hereto as Appendix "A" in their entirety. However, the portions quoted immediately above are certainly sufficient to meet any burden that might be placed on plaintiffs to establish a single triable issue of fact. They are entirely consistent with the facts stated in two of the cases cited by plaintiffs herein: *New v. Armour Pharmaceutical Co.*, 58 F.3d 445 (9th Cir. 1995) (even if plaintiffs in 1980's inquired about a possible case, they would have likely been told that they were not even injure [sic]); *Waage v. Cutter*, 1996 WL 674307 (accord).

Arizona Civil Appellate Procedure Rule 11(e) permits supplementation of the record in special circumstances such as are now before this Court:

> Correction or Modification of the Record. If any controversy arises as to whether the record discloses what actually occurred in the superior court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material is omitted from the record by error or accident or is misstated therein, the parties, upon stipulation, or the superior court upon motion (either before or after the record is transmitted to the appellate court), or the appellate court upon motion, may direct that the omission or misstatement be corrected. If appropriate, an amended record shall thereafter be transmitted to the appellate court. *All other questions as to the form and content of the record shall be presented to the appellate court.*
>
> [Emphasis added.] (As amended 1994.)

It is respectfully submitted that this Court should not refuse to even allow plaintiffs an opportunity to present relevant evidence when never before were they timely put on notice that it was their duty to present such evidence. This would dignify "trial by ambush" and would ignore Arizona Civil Appellate Procedure Rule 3's admonition that the appellate rules "shall be liberally construed in the furtherance of justice."

III. CONCLUSION

Plaintiffs respectfully request that, because plaintiffs argued at the trial court level that the defendants had the

burden of proof *and* not even one defendant contradicted this, the Court should either remand for an evidentiary hearing or grant plaintiffs' Motion to Supplement the record with the affidavits attached hereto as Appendix "A" and reverse the trial court's decision on the basis of those affidavits and/or other material already in the record.

RESPECTFULLY SUBMITTED this 5th day of March, 1997.

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IN THE SUPREME COURT

STATE OF ARIZONA

A DOE, a single person, and JANE DOE, et al.,	**SUPREME COURT NO.** CV-97-0194-PR
Plaintiffs/Appellants,	**STATE DEFENDANTS' MOTION TO STRIKE**
vs.	
BAYER, A.G. (Germany), INC., et al.,	No. 2 CA-CV 96-0167 (Pima County Superior Court No. 295223)
Defendants/Appellees.	No. 2 CA-CV 96-1066 (Pima County Superior Court No. 295251)

In accordance with Arizona's Rules of Civil Appellate Procedure, Appellees State of Arizona, Arizona Board of Regents, University of Arizona, University of Arizona College of Medicine, University Hospital, University Physicians, Inc., Dr. James Corrigan and Carolyn Corrigan ("State Defendants") hereby move this Court to strike from the record portions of Petitioners' appendix in support of their Petition for Review filed on April 7, 1997.

In their petition for review, Petitioners present this Court with evidence that was *not* properly offered to the Trial Court or the Court of Appeals. State Defendants,

therefore, move this Court to strike parts of Petitioners' appendix from the record. Specifically, Petitioners' appendix exhibit G (attachments A, B, and C) and exhibit K should be stricken from the record.

Exhibit G is Petitioners' motion for reconsideration and motion for order allowing supplementation of the record on appeal. There are three attachments to exhibit G – appendices A, B and C. "Appendix A" contains a collection of untimely disclosed, wholly unsupported affidavits from out-of-state lawyers, a hemophiliac, Petitioners' counsel, and a hemophiliac treatment counselor. These affidavits contain speculative opinions about issues supposedly related to this case. Appendices B and C contain language from Arizona cases discussing certain legal issues raised by Petitioners, but it is unclear who authored appendices B and C and for what purpose.

Petitioners offered these exhibits *for the first time* as attachments to its motion for reconsideration to the Court of Appeals. The Court of Appeals denied that motion and refused to supplement the record on appeal at such a late date. See March 21, 1997 Court of Appeals decision (attached as exhibit A). Despite that ruling, Petitioners are up to their same old tricks again. Now, Petitioners go even further by offering appendix exhibit K (affidavit of Roy Spece, one of Petitioners' own lawyers) for the first time in their petition.

In a clear violation of long-standing appellate procedure, Petitioners are attempting to proffer to the Court evidence that was not properly introduced to either the Trial Court or the Court of Appeals. It is well-settled Arizona law that arguments not raised at the trial court

level cannot be raised for the first time on appeal from summary judgment. *Navajo Nation v. MacDonald*, 180 Ariz. 539, 547, 885 P.2d 1104, 1112 (App. 1994) "[T]he parties cannot add exhibits, depositions, or affidavits to support their position nor can they advance new theories or raise new issues in order to secure a reversal of the lower court's determination." *Crook v. Anderson*, 115 Ariz. 402, 403-404, 565 P.2d 908, 909-910 (App. 1977) (citation omitted). Here, Petitioners attempt to do exactly that. As a matter of law, therefore, this Court should not consider exhibits G and K in reviewing Petitioners' Petition for Review. Instead, exhibits G and K should be stricken from the record.

RESPECTFULLY SUBMITTED THIS ___ day of May, 1997.

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

Jane Doe, et al.,	No. CV-97-0194-PR
Plaintiff/Appellant,	No. CA-CV 96-0167
vs.	(Pima County Superior Court No. 295223)
Bayer A.G. (Germany), et al.,	**APPELLANT/PLAINTIFF JANE DOE'S ADVISORY TO THE COURT RE FRACTIONATOR APPELLEES/DEFENDANTS' NOTICE OF SETTLEMENT**
Defendants/Appellees.	No. 2 CA-CV 96-0166
	(Pima County Superior Court No. 295251)

On December 29, 1997, the fractionator appellees/defendants filed their Notice of Settlement. Plaintiff/appellant Jane Doe files this pleading to advise the Court:

1. She will not sign any release (which has not yet been received by appellant/plaintiff) until the settlement

monies are tendered to her (which to this point has not happened);

2. There are certain contingencies (i.e., legal objections to the validity of ostensible class settlement in which appellant is taking part) that might prevent consummation of the settlement;

3. These contingencies should not affect Jane Doe's consolidated appeal because the same relevant legal issues will be raised within the context of appellant/plaintiff A Doe's entire case and appellant/plaintiff Jane Doe's case against the nonfractionator defendants regardless whether a settlement is consummated between Jane Doe and the fractionator appellees/defendants.

RESPECTFULLY SUBMITTED this 5th day of January, 1998.

IBANEZ & WILKINSON

By /s/ Rose Marie Ibáñez
Rose Marie Ibáñez
Attorneys for
Plaintiff/Appellant

(service list omitted)